VIJAYARATNAM v. PUBLIC PROSECUTOR

[A. Cr. J. (Hashim J.) October 18, 1961]

[K.L. — Criminal Appeal No. 46 of 1961]

Criminal Law and Procedure — Theft as servant — Penal Code, s.381 — Requirements of charge — Onus of proof on prosecution — Police Officers deposing "on information received" — Magistrate grounds for rejecting defence.

Criminal Procedure — Drafting charge — Technical words.

A charge under section 381 of the Penal Code must disclose who employed the accused and in whose possession the stolen articles were at the material time. Where technical words or expressions have to be used in drafting the charge the proper words or expressions should be obtained from the expert. The prosecution must prove that those articles were taken without the consent of the person in possession of those articles.

The expression "on information received" should not be used by police officers when giving evidence as its use may cloud the issue and/or prejudice the Court against the accused.

A Magistrate or President of Sessions Court in rejecting the accused's defence should show in his grounds of judgment that the defence had been carefully considered and give his reasons for rejecting it and not merely say that he accepted the evidence of the police witnesses.

CRIMINAL APPEAL.

Dato R. P. S. Rajasooria for the appellant.

Tengku Ahmad Rithauddeen (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

Hashim J.: The appellant was charged under section 381 of the Penal Code and he was convicted and sentenced to one day's imprisonment and a fine of $750, in default three months' imprisonment.

The appellant was charged as follows:—

"That you on 26th November, 1960, at about 2.50 p.m. at the P.W.D. State Workshop Store, Swettenham Road, Kuala Lumpur, in the State of Selangor, being an Overseer in the Public Works Department, committed theft by stealing property to wit 2 running rims for water pumps, 2 shaft bushes for water pumps and 5 bushes, total value $200, and that you have thereby committed an offence punishable under section 381 of the Penal Code."

In my opinion the charge was incorrectly drafted. The charge does not indicate as to who employed the appellant and in whose possession the articles were. There appears to be conflicting evidence as in whose possession these articles were on 26th November, 1960. The prosecution had also to prove that those articles were taken without the consent of the person in possession of those articles. According to the P.W.D. Chargeman, Che Chung Heng (P.W.4), he instructed Che Samuel (P.W.3), the Assistant Storekeeper, to keep those articles in the store but according to Che Samuel those articles were kept under the counter in the store on the instructions of Che Chung Heng and were not recorded in the store register. That part of the store up to the counter was used by members of the staff, including the appellant. The store proper was behind the counter. Therefore it is not clear at all up to the present as in whose possession those articles were on 26th November, 1960. The learned President did not appear to have directed his mind on this point.

The charge enumerated the articles alleged to have been stolen, as 2 running rims for water pumps, 2 shaft bushes for water pumps and 5 bushes. The Mechanical Engineer (P.W.2) in his evidence, presumably expert evidence, gave the technical names for those articles, namely, "wearing rings from a Sigmund water pump", "bushes from the same pump" and "brass bushes". Reading the charge and reading the evidence of the Mechanical Engineer, one would think that the Mechanical Engineer was referring to some other articles and not to the articles stated in the charge. In a case where technical words or expressions have to be used in the drafting of a charge I think the proper words or expressions must first be obtained from the expert. Otherwise there is a possibility of a confusion over the use or misuse of the words or expressions, as has occurred in this case.

The prosecution relied mainly on the evidence of the policeman (P.W.1). This witness commenced his evidence by stating that on information received he went to P.W.D. Stores at Swettenham Road at about 1.10 p.m. on 26th November, 1960. I think, if possible, the expression "on information received" should not be used by police officers when giving evidence. It would appear to mean that somebody has given information, which may be hearsay to the police and the police act on this information. In this particular case the police witness went on to say that on arrival at the scene he laid an ambush. This statement read in conjunction with the expression "on information received" would tend to indicate that the police had been told that an offence would be committed. In my opinion, this would, to say the least, cloud the issue when the trial commenced and it might to a certain degree prejudice the Court against the appellant. To put it in another way, there was a probability, that the Court trying the appellant was to a certain extent influenced by the opening statement of the police witness. In my opinion such a state of affairs should be avoided.

The learned President in his judgment stated that the police witness saw what happened and accepted his evidence as the truth. In my opinion the learned President did not satisfy himself as to whether the police witness saw the incident in every particular or that he thought he saw the incident as described by him. A glance at the photograph (P.6B) would indicate to the learned President that the police witness could not possibly have a clear view of the incident. From this photograph the police witness would appear to have stationed himself under a tree and there were bushes in front of him. It could not be possible for him to have a clear and unobstructed view with the bushes between him and the object of his observation. Furthermore, the appellant's car was parked in front of the store. The evidence, however, does not disclose

in what manner it was parked, but presumably it was parked parallel to the gate leading to the store compound. The police witness's view would be obstructed by this car as anybody coming out of the gate and intending to put anything in the car could do so from the side nearer to the gate. Therefore, when the police witness said he saw the appellant produce some copper rings from his pocket and put them under the rear seat the police witness was telling the Court what he thought he had seen and not what he had actually seen. In order to put something under the rear seat, as the police witness put it, the rear seat had first to be moved. The photograph Exhibit P.5B shows clearly that the rear seat has to be moved before any object can be put "under the rear seat." Yet the police witness did not say at all in his evidence he had seen the appellant remove the rear seat. The learned President, in my opinion, failed to direct his mind on the question as to whether the police witness could have an unobstructed view of the incident.

In my opinion, the learned President wrongly admitted the police report (Exhibit P.4). This report was made by the police witness at the end of his investigation. This report mentioned among other things that the appellant tried to bribe the police witness and the learned President had this in mind when he said in his judgment that he had ignored the statement of the police witness which came out in his cross-examination that appellant had attempted to bribe him (the police witness). The learned President obviously failed to direct his mind to the provisions of section 113 of the Criminal Procedure Code.

The learned President in his grounds of judgment stated that he did not accept the accused's defence, but did not give his reasons for rejecting the defence except by saying that he believed the evidence of the police witness. In my opinion, the learned President ought to show in his grounds of judgment that the defence had been carefully considered and his reasons for rejecting it. This, in my opinion, has not been done.

I therefore reverse the finding and sentence of the learned President and order the appellant be retried before another President.

Retrial ordered.

LOW SENG WAH v. PUBLIC PROSECUTOR

[A. Cr. J. (Neal J.) November 4, 1961]

[Ipoh — Criminal Appeal No. 58 of 1961]

Bribery and Corruption — Prevention of Corruption Ordinance, 1950, s.3 — Police corporal receiving moneys for showing favour to principal's affairs — Omission of essential ingredients in charge — Whether the accused was misled — Duplicity of charge — Whether money received was an inducement or reward — "Chance witness" — Meaning of.

Criminal Law and Procedure — Charge — Criminal Procedure Code (Cap. 6), ss.156, 256, 321 and 422.

The appellant, a corporal with the Federation Police, was charged and convicted under section 3(a) of the Prevention of Corruption Ordinance, 1950, for corruptly accepting $30 from one LYK by promising to assist him in settling a samsu case which was still under investigation. On appeal, it was argued *inter alia*, that (i) the charge disclosed no offence known to the law because of the omission of essential ingredients of the charge; (ii) the learned President erred in law as neither the charge nor the evidence showed that the appellant received money as a reward in relation to his principal's affairs; (iii) that the learned President erred in not realising that a particular witness was a "chance witness" and that his evidence should be viewed with caution.

Held: (1) even if there was an omission of an essential ingredient of the charge the appellant was not misled and if the charge can be said to be bad for duplicity there has been no miscarriage of justice;

(2) there was ample evidence that the money was received as an inducement for showing favour in relation to the appellant's principal's affairs;

(3) a "chance witness" is one who by chance overhears an admission of a person deceased at the time of hearing. The third prosecution witness was not a "chance witness" and there was no reason to treat this witness any different from any other witness.

Cases referred to:—

(1) *Public Prosecutor* v. *Syed Bakri*, [1955] M.L.J. xvii.

(2) *Abdul Salam* v. *Public Prosecutor*, [1955] M.L.J. 116 at p. 117.

(3) *Public Prosecutor* v. *Leong Yoon Meow*, [1953] M.L.J. xxxv.

(4) *Stewart and Harris*, 44 Cr. App. R. 29.

(5) *Lee Ship* v. *Public Prosecutor*, [1961] M.L.J. 143.

(6) *Mohamed Ghouse* v. *The King*, 11 S.S.L.R. 31.

(7) *Ong Joo Chin* v. *R.*, [1946] M.L.J. 1.

(8) *Letchumy* v. *Public Prosecutor*, 1 M.C. 129.

(9) *John Smith*, 44 Cr. App. R. 55.

(10) *Ismail Ahmad Peepadi* v. *Momin Bibi & Ors.*, A.I.R. 1941 P.C. 11 at p. 13.

CRIMINAL APPEAL.

David Marshall for the appellant.

Abdul Hamid bin Omar (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

Neal J.: The appellant was convicted by the President of the Sessions Court at Parit Buntar on the following charge:

"That you, on 12.6.60 at about 12 noon at No. 6523 Lorong Pekan Minggu, Sungei Gedong, Semanggol, Bagan Serai, in the State of Perak, being an agent employed in the Royal Federation of Malaya Police, to wit, Corporal 3396, did corruptly accept a sum of $30 in cash from one Lee Yew Khiam (f) for yourself for showing favour, in relation to your principal's affairs, namely, by promising to assist the said Lee Yew Khiam in settling a samsu case which is still under investigation vide Bagan Serai Report No. 547/60, and that you thereby committed an offence punishable under section 3(a) of the Prevention of Corruption Ordinance, 1950. (No. 5/50)."

Mr. Marshall who appeared on behalf of the appellant argued the following seven grounds of appeal:

"(1) The charge disclosed no offence known to the law;

(2) The learned President erred in law—

In convicting the appellant on a charge in respect of which the principal ingredient was not proved, namely,